NO. 47929-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHANNE THOMAS McKITTRICK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jack Frederick Nevin

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

"It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt." *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

The State's theory of this case was that because all the men involved were skinheads, Derek Wagner was killed for violating the codes of skinhead culture by having an affair with a fellow skinhead's wife. A jury convicted appellant, Shanne McKittrick, of manslaughter and felony murder during the course of an assault and co-defendant, Eric Elliser, of assault and felony murder during the course of an assault. The jury found that McKittrick stabbed Wagner during a fight and Elliser stabbed him later in the backyard of a nearby home where Wagner's body was discovered. Wagner was stabbed three times. The autopsy revealed that he was stabbed once in the heart, once through the liver and stomach, and once in the abdomen. The fatal wound was the stab to his heart.

The fight between McKittrick and Wagner lasted a matter of seconds at the time Wagner was stabbed and ran away. The medical examiner testified that a small number of minutes passed between the inflictions of the wounds. He could not conclude to a reasonable degree of medical certainty whether the fatal stab to the heart occurred before or after the stab to the abdomen. The stab to the heart was the wound that caused

Wagner's death and the two other wounds did not cause or contribute to his death.

The uncontroverted forensic evidence substantiates that the State failed to prove McKittrick caused the death of Wagner because it failed to prove beyond a reasonable doubt that McKittrick inflicted the fatal wound to the heart. McKittrick's convictions must therefore be reversed and dismissed because there was insufficient evidence to prove manslaughter and felony murder.

In the alternative, reversal is required because the trial court erred in giving the first aggressor instruction, which negated McKittrick's claim of self-defense. The record established that the fight ensued after McKittrick was closely following a car in which Wagner was a passenger and Wagner made the driver pull over. Then Wagner armed himself with a knife and confronted McKittrick. The first aggressor instruction was not warranted because McKittrick's conduct did not provoke Wagner's use of deadly force.

Further, reversal is required because the trial court abused its discretion in admitting irrelevant, unduly prejudicial evidence of skinhead culture, where it was unnecessary to establish motive, thereby denying McKittrick his constitutional right to a fair trial.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove beyond a reasonable doubt that McKittrick committed manslaughter in the first degree.

2. There was insufficient evidence to prove beyond a reasonable doubt that McKittrick committed felony murder in the second degree.

3. The trial court erred in giving the primary aggressor jury instruction.

4. The trial court erred in sustaining the State's improper objections to defense counsel's closing argument on self-defense.

5. The trial court erred in admitting evidence on skinhead culture.

6. The trial court erred in allowing expert testimony on skinhead culture.

7. In the event the State substantially prevails on appeal, this Court should deny any request for costs.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is reversal and dismissal required where the uncontroverted forensic evidence substantiates that the State failed to prove McKittrick caused the death of the Wagner because it failed to prove beyond a reasonable doubt that McKittrick inflicted the fatal stab wound to the heart? (Assignments of Error 1 and 2)

2. Is reversal required where the trial court erred in giving the first aggressor instruction which negated McKittrick's claim of self-defense and the trial court compounded the error by erroneously sustaining the State's improper objections to defense counsel's closing argument on self-defense? (Assignments of Error 3 and 4)

3. Where evidence of skinhead culture was not necessary to establish motive and the unduly prejudicial effect of the evidence far outweighed any probative value, is reversal required because admission of the evidence denied McKittrick his constitutional right to a fair trial? (Assignments of Error 5 and 6)

4. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs where McKittrick is presumably still indigent because there has been no evidence provided to this Court, and no findings by the trial court, that McKittrick's financial condition has improved or is likely to improve? (Assignment of Error 7)

D. STATEMENT OF THE CASE[1]

1. Procedure

On December 20, 2013, in the name and by the authority of the State of Washington, the Pierce County Prosecutor's Office charged appellant, Shanne Thomas McKittrick, with three crimes as an accomplice. The State charged McKittrick with murder in the second degree; murder in the second degree in the course of committing assault in the first, second, or third degree; and conspiracy to commit murder in the second degree. The State alleged that all three crimes were committed while armed with a deadly weapon: a knife. Eric Michael Elliser, Mark Michael Stredicke, Jeffrey Allan Cooke, and Melissa Ann Bourgault were named as co-defendants. CP 1-3.

Pretrial hearings began on September 26, 2014, before the Honorable Jack Nevin in State of Washington versus McKittrick, Elliser, Streidicke, and Bourgault.[2] 4RP 4. Cooke pleaded guilty and agreed to

[1] There are 32 volumes of verbatim report of proceedings: 1RP - 04/04/14; 2RP - 04/14/14; 3RP - 09/05/14; 4RP - 09/26/04, 10/03/14, 10/16/14, 10/30/14; 11/19/14; 5RP - 01/23/15, 01/27/15, 01/30/15; 6RP - 02/23/15; 7RP - 03/02/15; 8RP - 03/03/15; 9RP - 03/04/15; 10RP - 03/05/15; 11RP - 03/09/15; 12RP - 03/10/15; 13RP - 03/11/15; 14RP - 03/12/15; 14RP - 03/12/15; 15RP - 03/16/15; 16RP - 03/17/15; 17RP - 03/18/15; 18RP - 03/19/15; 19RP - 03/23/15; 20RP - 03/24/15; 21RP - 03/25/15; 22RP - 03/26/15; 23RP - 04/13/15; 24RP - 04/14/15; 25RP - 04/15/15; 26RP - 04/16/15; 27RP - 04/17/15; 28RP - 04/20/15; 29RP - 04/21/15; 30RP - 04/22/15; 31RP - 04/23/15, 04/27/15, 04/28/15; 32RP - 05/19/15, 06/26/15, 08/21/15.

[2] Bourgault eventually pleaded guilty and did not testify at trial.

testify for the State. 4RP 8. On January 27, 2015, the State filed an amended information, charging McKittrick with murder in the first degree and murder in the second degree in the course of committing assault in the first, second, or third degree. The State alleged that both crimes were committed while armed with a deadly weapon: a knife. CP 12-13.

On February 23, 2015, over defense objection, the court ruled that a Security Threat Group Coordinator with the Department of Corrections qualified as an expert on prison gangs such as skinheads. 6RP 9-10, 144-52. On March 3, 2015, over defense objection, the court ruled that evidence of skinhead affiliation was admissible under ER 404(b). 8RP 127-49.

Following pretrial motions, trial testimony began on March 11, 2015. 13RP 16. On April 28, 2015, the jury found McKittrick not guilty of murder in the first degree but guilty of manslaughter in the first degree while armed with a deadly weapon and guilty of second degree felony murder while armed with a deadly weapon. 13RP 27-29. The jury found Elliser guilty of felony murder in the second degree while armed with a deadly weapon and guilty of assault in the first degree while armed with a deadly weapon. 31RP 29. The jury found Streidicke not guilty of felony murder in the second degree and not guilty of assault in the first degree. 31RP 29-30.

The defense moved for a new trial on May 19, 2015. 32RP 4-31. On August 21, 2015, the court denied the motion and proceeded to

sentencing. 32RP 32-62. The court vacated and dismissed the manslaughter in the first degree conviction on double jeopardy grounds. 32RP 64-65; CP 227-41. The court sentenced McKittrick to 299 months in confinement with 24 months of community custody and imposed $800.00 in mandatory fees. 32RP 78-79; CP 227-41.

McKittrick filed a timely notice of appeal. CP 244.

2. Facts

a. Discovery of Wagner's Body

Winter Mimura was living at 4517 South Asotin Street with his wife and children on November 17, 2013. 13RP 88-90. It was raining really hard that morning. 13RP 106. While standing just outside his back door, he noticed that a bar on the cyclone fence on the side of the house was slightly bent which seemed unusual. 13RP 90-91, 94, 98. He also noticed that the gate to the side of the house was open, which was unusual because they keep it closed to prevent their dog from getting out. 13RP 95- 99. Mimura and his wife did not hear anything overnight that disturbed their sleep. 13RP 100-01, 107. Their dog was in their daughter's room upstairs with music playing. 13RP 107. He did not hear the dog barking. 13RP 100. Later in the afternoon, he found a body in the backyard and immediately called police. 13RP 91-92.

b. Officers on the Scene

Tacoma police officers were dispatched to the Mimura house following a call around 1 o'clock that a dead man was lying in the backyard. 13RP 73-75. When officers arrived, the Tacoma Fire Department had already examined the body and pronounced the man dead. The body was in a state of rigor mortis, facing up with arms out and had multiple stab wounds. 13RP 75-76, 82; 23RP 13-14. The officers found a knife sheath partially under the body. 13RP 84; 14RP 41. While canvassing the neighborhood, officers found a knife and secured the area until the forensics team arrived. 13RP 79-80, 83.

c. Forensic Evidence

Pierce County medical examiner, Dr. Thomas Clark, conducted an autopsy of Wagner on November 18, 2013. 21RP 154-57. Using a diagram, he identified three stab wounds on the body. One stab wound in the chest struck the heart; one stab wound went through the liver and into the stomach; one stab wound went to the abdomen. 21RP 154-55, 161-63; Ex. 270. Dr. Clark concluded that Wagner died as a result of the stab wound to the heart and the other wounds did not contribute to his death. 22RP 81-83. The fatal stab wound to the heart occurred before the stab wound to the liver and stomach, but Dr. Clark could not conclude whether it occurred before or after the stab wound to the abdomen. 21RP 171; 22RP 66. A "small

number of minutes" passed between the inflictions of the wounds. 22RP 66-67. Dr. Clark could not determine how many minutes but at least a minute. 21RP 172. He could not conclude whether the same blade or same person inflicted the three stab wounds. 22RP 60-62, 101.

d. Witnesses before Fight

Joshua Loper became good friends with Wagner when they served time in prison. He is a skinhead and Wagner was a skinhead. 15RP 41, 44. On a Friday in mid-November 2013, Wagner came to visit him at his home in Yelm. 15RP 49-51. Wagner brought his tattoo equipment and touched up a couple of Loper's tattoos. 15RP 52-53. That night, they drank some beer and went to a couple of parties. 15RP 51-59. The following day, Cooke came over and they hung out. 15RP 60-65. Wagner wanted to cut his hair so they helped him shave his head. 15RP 82-83. Around 5 o'clock, they went to buy beer and returned home for dinner. 15RP 66-68. Then he went upstairs to take a nap because he had to work that night. 15RP 67-70. When he woke up around 9 o'clock, Wagner and Cooke were gone. 15RP 71-72. He went to work and tried to call Wagner but could not reach him. 15RP 73-75. Loper learned the next day from Wagner's mother that he was killed. 15RP 81-82.

Michele McKittrick [3] is McKittrick's sister and Elliser's girlfriend. 26RP 115. On the night of November 16, 2013, Elliser, who lived with Michele and her children, received a call from Cooke, saying he wanted to come over. 26RP 122, 124. Shortly thereafter, Cooke arrived with Wagner and Matt Wright. 26RP 123. They were drinking and brought beer with them. 26RP 125-26. McKittrick and Melissa Bourgault arrived later in the evening. 26RP 124. Elliser left to pick up Danny Harvester and when they came back, Harvester was drunk and carrying a bottle of whiskey. 26RP 130-31.

People were drinking and getting loud so after a while she told Elliser to tell everyone to leave. 26RP 131-135. Cooke and Wagner were clearly intoxicated. 26RP 148. She walked out to the front yard to see if everyone was leaving and saw Wagner holding a knife in an aggressive stance. 26RP 135-39, 152. Bourgault repeatedly told him to put down the knife but he kept it. 26RP 139. Michele did not see anyone else with a knife but would not doubt that they would carry a knife. They all have an array of knives. 26RP 155-57, 172-74, 177-78. When she yelled at everyone to go home, Cooke, Wagner, and Wright got in Cooke's car and left. McKittrick and Bourgault left a few seconds later. 26RP 140-43.

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[3] For clarity, Michele McKittrick will be referred to as Michele and Shanne McKittrick will be referred to as McKittrick.

Although she told Elliser to stay home, he drove off in the same direction as the others. 26RP 143-46. He came home about 1:30 in the morning. 26RP 146-47.

e. Witnesses at Fight

Jeffrey Cooke [4] is a skinhead and Wagner was a skinhead. He met Wagner once in prison and after they were released. 17RP 57-58. McKittrick, Elliser, and Mark Stredicke are his good friends. Loper is a good acquaintance. 17RP 60. He has known Stredicke the longest and knows his wife, Erin Cochran. 17RP 60-61. On November 16, 2013, Cooke drove out to Yelm to hang out with Wagner and Loper. 17RP 64-66. Later that evening, when he was returning to Tacoma, Wagner said he wanted to go with him to talk to Elliser about Cochran. Wagner intended to explain that when he was having a sexual relationship with Cochran, he did not know that she was married to Stredicke. 17RP 71-72.

Cooke, Wagner, and another skinhead, Matt Wright, bought some beer and went to Elliser's house where he lived with Michele. 17RP 75, 80-81. McKittrick and Bourgault arrived shortly thereafter. 17 RP 84, 86. An argument arose when McKittrick started ranting while he was talking on the

[4] Cooke was initially charged with murder in the second degree, felony murder in the second degree, and conspiracy to commit murder in the second degree. He agreed to testify for the State to have the charges reduced to assault in the second degree. His sentence would be 14 months which he has already served. 17RP 64, 18RP 158-69.

phone with Stredicke about Wagner being the guy who slept with Stredicke's wife. Cooke took the phone from McKittrick and talked to Stredicke who accused him of hanging out with the guy who had sex with his wife. 17RP 86. Stredicke hung up on him and McKittrick was still pretty mad. 17RP 86-88. While Cooke was trying to calm McKittrick down, Wagner approached them and confronted McKittrick. 17RP 88-89. They started arguing about Wagner's affair with Cochran and kept yelling at each other. 17RP 89-90.

The arguing subsided and then flared up again so Cooke decided it was time to go. 17RP 90-91. As everyone started to leave, another argument erupted in the front yard. 17RP 113-14. McKittrick was on the phone with Stredicke and yelled at Cooke about him wanting to fight McKittrick over the dispute about Wagner. 17RP 114. Cooke took the phone and told Stredicke that he never said anything about fighting McKittrick in defense of Wagner and hung up. 17RP 120-21. McKittrick kept challenging Cooke so he anticipated a fight. 17RP 121. To avoid letting things go too far, he took his knife off his belt and threw it on the grass. 17RP 94. Then Wagner went to pick up the knife. Both McKittrick and Bourgault screamed "don't pick up that knife." 17RP 121. Wagner told Bourgault to "shut-up" and called her a vulgar name. 17RP 121.

Wagner picked up the knife and after Elliser separated McKittrick and Cooke, everyone went to their cars. 17RP 122-25.

Wagner and Wright got in Cooke's car and he started driving to his home. Wagner was in the passenger's seat and Wright sat in the back. 18RP 6, 8. As Cooke drove a couple of blocks, he saw a car approaching with high beams on. At first he thought it was the police because he was driving drunk, but Wagner or Wright said it was McKittrick. 18RP 6-7. When the car came up behind them, Wagner told him to pull over, "I'm not afraid, I'll get down with the dude, pull over, pull over." 18RP 7. When Cooke kept driving, Wagner pushed the steering wheel, forcing Cooke to swerve to avoid hitting a median in the road. 18RP 8. Wagner kept yelling at him to pull over, so he stopped the car at the corner of Alaska and 45th streets. 18RP 8. Wagner grabbed Cooke's Ka-Bar knife off the console, tucked it into the back of his pants, and got out of the car. 18RP 8-9. By the time Cooke got out, McKittrick and Bourgault were already out of their car. Since McKittrick was standing on the passenger side, Cooke thought it was Bourgault who was driving and using the high beams. 18RP 10-11.

Wagner and McKittrick started screaming and walking toward each other ready to fight and kept circling each other. 18RP 11. Elliser then pulled up in his car and got out. Wagner told Elliser to "get this dude or get your boy," referring to McKittrick. 18RP 12. Elliser said "you lied to me

or you lied, bitch" and "went in the situation and went to go grab Derek." 18RP 17.

To stop the fight, Cooke walked to his car to get a bat. He had his back turned for only a second when he heard Wagner say "help me" and McKittrick say "put down what's in your hand." 18RP 18; 20RP 85. When he turned around, Wagner said "he stabbed me" and ran down the street. 18RP 18-19. By the way Wagner was running, he did not seem seriously injured. 18RP 21. McKittrick walked up to Cooke and told him to "go, I stuck him" and gave him a little nudge. 18RP 19. McKittrick, Bourgault, and Elliser got in their cars and left. Cooke drove around the neighborhood with Wright to find Wagner but did not find him. 18RP 20-26. Awhile later, McKittrick appeared at his house and wanted the truck that he had previously planned to buy. Cooke filled out the paperwork and McKittrick left in the truck. 18RP 26-28.

In the morning, Elliser, Harvester, McKittrick, Bourgault, and Stredicke all showed up at Cooke's house. 18RP 45-46. They questioned him about where Wagner could be and told him to call if he hears from Wagner. 18RP 46-47. Later that day, he called and alerted Elliser or McKittrick that several police vehicles were at a house down the street. 18RP 47. Cooke, Elliser, and McKittrick met at Denny's to talk. When Cooke asked McKittrick why he stabbed Wagner, he said he "didn't have a

choice." 18RP 48-49; 20RP 83-84. They met again at McKittrick's house where he said "he was sorry" and "he didn't have a choice" because Wagner rushed at him with Cooke's knife. 20RP 84.

Matthew Wright used to be a skinhead in November 2013. 16RP 7. He, Cooke, and Wagner went to Elliser's house after they had been drinking. 16RP 17-19. Elliser was home with his girlfriend and some children. 16RP 21. McKittrick and his girlfriend came afterwards and Wagner and McKittrick started talking about trucks. 16RP 23. Everyone was having a good time drinking until Wagner became aggressive when he heard McKittrick and Cooke having a conversation. Wagner thought they were talking about him and confronted McKittrick, trying to goad him into a fight. 16RP 26, 95, 99. At that point, McKittrick said he was leaving because he did not want to be there with Wagner. 16RP 95-96, 99. Then Elliser's girlfriend wanted everyone to leave. 16RP 27. When they went outside, McKittrick's girlfriend said something to Wagner and he called her a "bitch." 16RP 28. Wagner had a knife that he took from Cooke earlier that night. 16RP 29-30. McKittrick started "chest bumping" with Wagner for calling his girlfriend a "bitch." 16RP 31. McKittrick had a knife on his belt. 16RP 32-33.

After Cooke intervened, Wright, Wagner, and Cooke left. 16RP 33. McKittrick and his girlfriend followed them and they were right behind

Cooke's car honking their horn. 16RP 34-35. Wagner told Cooke to "pull over, I'm going to get out and beat his ass, fight him." 16RP 34. Wagner tried to force Cooke to pull over. 16RP 104-05. When Cooke stopped the car, Wagner got out and charged toward McKittrick holding a knife. 16RP 105-06. Wagner put the knife on his belt or in his pants. 16RP 108. Wagner and McKittrick started "fist fighting." 16RP 38. Wagner went to the ground once and McKittrick stood him up. Then Wagner started "whipping" on him and getting the better of the fight. 16RP 41. Wright did not see McKittrick or Wagner with a knife while they were fighting. 16RP 42, 71. He heard McKittrick yell "he's trying to grab a knife" and then Wagner ran across the street. 16RP 44. McKittrick told Cooke, "we got to go, I just stabbed him." 16RP 44. He did not see Wagner get stabbed. 16RP 70-71. Elliser arrived in his car as Wagner ran away. 16RP 44. Wright and Cooke drove around to look for Wagner but did not find him. 16RP 45-46. McKittrick showed up at Cooke's house later and Wright heard McKittrick say he stabbed Wagner. 16RP 46, 72-74.

f. Evidence of Skinhead Culture

William Riley works is an investigator in the Special Investigations Office of the Department of Corrections. 24RP 19. He oversees a statewide database that monitors prison groups such as skinheads. 24RP 20-21. Common characteristics among skinheads include not interfering with

another man's home life, loyalty, and respect. 24RP 23-26. Discipline for violations range from being ordered to write an essay to a fight or assault. 24RP 27-28. Marital infidelity would be a sign of disrespect and constitutes a major violation and could result in more than just a bare knuckle fight. 24RP 29-30, 40.

Cooke testified that a skinhead who commits an offense could be disciplined by a one-on-one fist fight or a fight against a group of skinheads. 17RP 92. Marital infidelity is considered a big betrayal of trust and loyalty because "as skinheads, you pledge your loyalty and respect and your honor to each other." 18RP 70-71.

E. ARGUMENT

1. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT McKITTRICK COMMITTED MANSLAUGHTER AND FELONY MURDER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *In re Winship*, 397 U.S. 358, 362-63, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338,

851 P.2d 654 (1993). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If the evidence is insufficient, the conviction must be reversed and the case dismissed with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Whether evidence is sufficient is a question of constitutional law reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

The trial court instructed the jury on the elements of manslaughter in the first degree and felony murder in the second degree:

> To convict Shanne McKittrick of the lesser included crime of manslaughter in the first degree as to Count I, each of the following elements of the crime must be proven beyond a reasonable doubt:
>
> (1) That on or about the 17th of November, 2013, Shane McKittrick *caused* the death of Derek Wagner;
> (2) That Shanne McKittrick's conduct was reckless;
> (3) That the acts occurred in the State of Washington.

CP 343 (emphasis added).

> To convict Shanne Thomas McKittrick of the crime of felony murder in the second degree as charged in Count Two, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about November 17, 2013, Shanne Thomas McKittrick, committed the crime of assault in the first degree or assault in the second degree;
> (2) That Shanne Thomas McKittrick *caused* the death of Derek Wagner in the course of and in furtherance of such crime, or in immediate flight from such crime;
> (3) That Derek Wagner was not a participant in the crime of assault in the first degree or assault in the second degree; and
> (4) That any of these acts occurred in the State of Washington.

CP 352 (emphasis added).

The record reflects that two witnesses testified that they saw the fight between Wagner and McKittrick. Jeffrey Cooke said that Wagner and McKittrick were "screaming at each other, cussing at each other, kind of like circling each other, but not at the same time" and both of them had their hands up. 18RP 11. To stop the fight, Cooke walked to his car to get his bat. 18RP 18. "My back was turned for only a second. I didn't see them fighting before that, and I don't know what happened when my back was turned, sir, but they weren't fighting prior to that." 20RP 85. While Cooke's back was turned, he heard Wagner say "help me" and McKittrick say "what's in your hand, or, put down what's in your hand." When he turned around, he saw Wagner run down the street saying "he stabbed me, or, I got stabbed." 18RP 18-19.

Matthew Wright testified that when Wagner got out of the car, he charged toward McKittrick holding a knife. 16RP 105-06. Wagner put the knife on his belt or in his pants. 16RP 108. McKittrick did not have a knife. 16RP 108. Wagner and McKittrick started "fist fighting." 16RP 38. Wagner went to the ground once and McKittrick stood him up. Then Wagner started "whipping" on him and getting the better of the fight. 16RP 41. Wright did not see McKittrick or Wagner with a knife while they were fighting. 16RP 42. He heard McKittrick yell "he's trying to grab a knife"

and then Wagner ran across the street. 16RP 44. McKittrick told Cooke, "I just stabbed him," but Wright did not see Wagner get stabbed. 16RP 44, 16RP 70-71. The testimony of Cooke and Wright established that Wagner was somehow stabbed in a matter of seconds.

Pierce County Medical Examiner, Dr. Thomas Clark, testified that Wagner was stabbed three times.[5] 21RP 161. He was stabbed in the left ventricle of the heart; through the liver and into the stomach; and in the abdomen. 21RP 161-63. The prosecutor asked if "a period of minutes would have passed between the infliction of number one and number three and number two." 22RP 66. Dr. Clark clarified that "it would be measured in *a small number of minutes*." 22RP 66-67 (emphasis added). He could not determine how many minutes but at least a minute. 21RP 172. Given Dr. Clark's expert opinion that a small number of minutes passed between the inflictions of the wounds, McKittrick could not have inflicted all three wounds during the fight that lasted just seconds when Wagner was stabbed.

Further, Dr. Clark could not conclude whether the fatal stab wound to the heart occurred before or after the stab wound to the abdomen. "Number one happened before number two. I cannot say whether it

[5] Using a diagram, Dr. Clark numbered the stab wounds for convenience, but the numbers do not indicate the order of infliction. Number one is the stab wound to the heart. Number two is the stab wound to the liver and stomach. Number three is the stab wound to the abdomen. 21RP 161-63; Ex. 270.

happened before number three. Number three could have happened before or after number one. Number three could have happened slightly before number two." 21RP 171. The testimony established that McKittrick stabbed Wagner but based on Dr. Clark's expert opinion, the first stab could have been to the heart or to the abdomen. There is no evidence that McKittrick inflicted the fatal stab wound to the heart.

Dr. Clark could not be specific about the number of minutes that Wagner "could have had meaningful activity" after the stab wounds. 22RP 67. He believed that Wagner could have ran after the stab wound to the heart and he could have possibly ran after the stab wound to the liver and stomach. Wagner still had enough blood pressure to bleed into the fat when the stab wound to the abdomen was inflicted, but Dr. Clark could not determine whether Wagner could have ran after that wound. 21RP 166-67; 22RP 65-66. Based on Dr. Clark's expert opinion, Wagner could have possibly ran after any of the stab wounds.

Dr. Clark could not conclude whether the same person or same blade caused the wounds and "there isn't a good correlation between the size of a wound on the skin surface and the blade, nor is there a correlation between the depth of a wound track and the blade." 22RP 60-62, 101. The forensic evidence therefore does not reveal how many people stabbed Wagner or how many knives or what type of knives were used.

Importantly, Dr. Clark concluded that the stab wound to the heart "would have been rapidly fatal." The stab wound to the liver and stomach "could be measured in hours to days depending on whether an infection happened or whether the liver injury clotted and didn't bleed quickly." If the stab wound to the abdomen were fatal, "that time would probably be measured in days." 21RP 165-66. He concluded to a reasonable degree of medical certainty that Wagner died as a result of the stab wound to the heart:

> [T]he presence of blood in the chest and in the pericardial space proves beyond a shadow of a doubt that he was alive when this injury was inflicted. The presence of 200 cc of blood in the pericardium is about as much as will fit in the pericardium over a short period of time. That proves that he died as a result of the stab wound.

22RP 82.

Dr. Clark concluded that under the circumstances of Wagner's death, the other stab wounds were not contributing factors. 22RP 82-83.

As the State told the jury during closing argument, "Dr. Clark's evidence is what it is." 30RP 171. The uncontroverted forensic evidence proves that a small number of minutes passed between the inflictions of the wounds and that the stab wound to the abdomen could have been inflicted before or after the fatal stab wound to the heart. The jury found that McKittrick stabbed Wagner during the fight and Elliser stabbed Wagner in

the backyard of a nearby house where his body was discovered.[6] The testimony revealed that within seconds, Wagner was stabbed and ran away. A surveillance video showed Elliser's car circling the neighborhood after the fight. Ex. 239. Winter Mimura testified that the following morning, he noticed a bent crossbar on the fence and that the gate was open which was unusual. 13RP 90-99. Ashley Mimura testified that it was "raining really hard." 13RP 106. Therefore the rain could have washed off any trace of blood on the fence or gate.

Consequently, even when admitting the evidence as true and drawing all reasonable inferences therefrom while viewing the evidence in the light most favorable to the State, no rational juror could have found that McKittrick caused the death of Wagner by stabbing him in the heart. Reversal and dismissal is required because there was insufficient evidence to prove the essential elements of manslaughter and felony murder beyond a reasonable doubt.[7]

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[6] The jury convicted Elliser of assault in the first degree with a deadly weapon. McKittrick was not charged as an accomplice to the assault. CP 355, 356, 357, 358, 359.

[7] Elliser's conviction for felony murder as an accomplice should also be reversed and dismissed.

2. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN GIVING THE PRIMARY AGGRESSOR JURY INSTRUCTION, WHICH NEGATED McKITTRICK'S CLAIM OF SELF-DEFENSE, WHERE McKITTRICK DID NOT PROVOKE WAGNER'S USE OF DEADLY FORCE.

"Aggressor instructions are not favored." *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990)(citing *State v. Wasson*, 54 Wn. App. 156, 161, 772 P.2d 1039, *review denied*, 113 Wn.2d 1014, 779 P.2d 731 (1989); *State v. Arthur*, 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985). This Court recognized that the first aggressor instruction should be used sparingly:

> [F]ew situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction. While an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction.

State v. Douglas, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005)(quoting *State v. Riley*, 137 Wn.2d 904, 910 n. 2, 976 P.2d 624 (1999)(citation omitted)).

Over defense objection, the trial court gave the following instruction:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense or defense of another and thereupon kill or use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant, was the aggressor,

> and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 366; 27RP 95-111; 28RP 19.

Using PowerPoint, the State highlighted the first aggressor instruction during closing argument. Ex. 274

The record substantiates that McKittrick was not the first aggressor. Jeffrey Cooke testified that while everyone was leaving Elliser's house, he and McKittrick got into an argument and he took off his knife and threw it on the grass. 17RP 113-21. Then Wagner went to pick up the knife and both McKittrick and Bourgault screamed "don't pick up that knife." 17RP 121. Wagner told Bourgault to "shut-up" while calling her a vulgar name and took the knife. 17RP 121-22. Michele McKittrick also saw Wagner take the knife. 26RP 137-39. After Cooke drove off with Wagner and Wright in his car, he saw a car approaching with high beams on and either Wagner or Wright said it was McKittrick. 18RP 6-7. Wagner told Cooke to pull over, "I'm not afraid, I'll get down with the dude, pull over, pull over." 18RP 7. When Cooke kept driving, Wagner pushed the steering wheel, forcing Cooke to swerve to avoid hitting a median in the road. 18RP 8. Wagner kept yelling at him to pull over, so he stopped the car. 18RP 8. When Cooke pulled over, Wagner grabbed Cooke's Ka-Bar knife off the

console, tucked it into the back of his pants, and got out of the car. 18RP 8-9.

Wright testified that he saw the car right behind them and heard honking. 16RP 34-35. Wagner told Cooke to "pull over, I'm going to get out and beat his ass, fight him." 16RP 34. Wagner tried to force Cooke to pull over so that he could fight McKittrick:

Q. But at some point during that drive, Mr. Wagner actually reached out and tried to grab the steering wheel and force Mr. Cooke to pull over?
A. He tried to force Mr. Cooke to pull over.
Q. Mr. Cooke to pull over, I'm sorry. And when he's trying to force Mr. Cooke to pull over the reason he wants to force Mr. Cooke to pull over is because *Mr. Wagner had an intent to fight Mr. McKittrick, correct?*
A. *Yes.*
Q. And that's why he was saying, pull over, I want to fight him, or words to that to that effect?
A. Yes.
Q. He wasn't like, don't let that guy get to me?
A. Yes.
Q. He wasn't, please, let's keep me away from him or keep him away from me, right? He wanted Mr. Cooke to stop the car to the point that he was willing to actually grab the steering wheel and possibly cause an accident *just so that he could get out and start a fight with Mr. McKittrick, correct?*
A. *Yes.*
Q. And as soon as Mr. Cooke did pull over, that's what Mr. Wagner did, right?
Q. Yes.
A. He got out of that car, right?
Q. Yes.
A. Now, counsel was asking you a question about whether or not you saw the knife or didn't see the knife. When he got in the car, he was holding the knife in his hand, right?
A Yes.

Q. Did you ever see him put the knife away, put the knife up?
A. No
Q. *So when he got out of the car, to your knowledge, he still had the knife on him, is that correct?*
A. *Yes.*
Q. *And he started charging Mr. McKittrick, is that correct?*
A. *Yes.*

16RP 105-05 (emphasis added).

This Court determined that a first aggressor instruction is proper when there is "credible evidence that the defendant *provoked the use of force, including provoking an attack that necessitates the defendant's use of force in self-defense*." *Douglas*, 128 Wn. App. at 563 (emphasis added). McKittrick's conduct of following Cooke's car and using high beams and honking did not provoke the need for Wagner to grab Cooke's Ka-Bar knife and charge toward McKittrick. In fact, Cooke thought Bougault was driving and flashing the high beams. 18RP 10-11. Even if McKittrick was driving, he did not precipitate the need for Wagner to use deadly force. Neither Cooke nor Wright said McKittrick was brandishing a knife while in the car. *See Riley* 137 Wn.2d at 910 ("If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction.") There was absolutely no justification for Wagner to arm himself with a deadly weapon and confront McKittrick.

It is evident that McKittrick did not expect a knife fight. As Cooke explained at the pretrial hearing, skinheads get drunk and challenge each other to fist fights:

> Q. When you guys get together and drink to excess, it is not unusual for fights to occur between you?
> A. Absolutely not.
> Q. Okay. And, again, this is because this is who you all are, right?
> A. It's pretty much the culture, pretty much.
> Q. It's not -- it's the culture of you and your friends, not necessarily a Skinhead thing?
> A. Generally -- I mean, normal people normally don't get drunk and pummel each other sometimes or get into disagreements and it turns to fisticuffs as often. Our basis as Skinheads is a lot of it is based off pride. We get drunk and sometimes we get in disagreements or somebody says something stupid and we fight.
> Q. Okay.
> A. We drink and we fight.

8RP 69-70.

Cooke described at trial that skinheads are disciplined by a one-on-one fist fight or a fight against a group of skinheads, "getting kicked, punched, pretty much fighting." 17RP 92 (3/18). He never said at any time that skinheads fight each other with knives. When Cooke anticipated a fight with McKittrick as they were leaving Elliser's house, he "didn't want things to go too far," so he took his knife off his belt. 17RP 94. When Wagner went to pick up Cooke's knife, Bourgault "was screaming at him, so was Shanne, don't pick up that knife." 17RP 121. McKittrick was clearly trying

to prevent the dispute from escalating into a fight with knives. At the time of the fight, Cooke heard McKittrick say "put down what's in your hand." 18RP 18; 20RP 85. Wright heard McKittrick yell "he's trying to grab a knife." 16RP 44. McKittrick told Cooke later that he stabbed Wagner because "he didn't have a choice" when Wagner rushed at him with the knife. 20RP 84. The record establishes that Wagner was the first aggressor by arming himself with a knife and confronting McKittrick.

Moreover, the provoking act cannot be the assault and any provoking act cannot be directed toward one other than the victim, unless the act was likely to provoke a belligerent response from the actual victim. *Kidd*, 57 Wn. App. at 100. "It has long been established that the provoking act must also be related to the eventual assault as to which self-defense is claimed." *Wasson,* 54 Wn. App. at 159. Even if the act of following Cooke's car was somehow provoking, it could have been directed at Cooke not Wagner and Wagner clearly did not assail McKittrick to protect Cooke. The record reflects that McKittrick and Cooke almost fought at Elliser's house because McKittrick thought that Cooke wanted to fight him in defense of Wagner. 17RP 113-21. There is no evidence that McKittrick acted intentionally to provoke a knife fight with Wagner. *See Wasson*, 54 Wn. App. at 159 (there is no evidence that the defendant acted intentionally to provoke an assault from the victim).

Not only did the trial court err in giving the first aggressor instruction, it erred in sustaining the State's improper objections during defense counsel's closing argument on self-defense:

> [DEFENSE COUNSEL]: Taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident, *you put yourself in the shoes of the defendant*. This is not an objective standard this is not, well, this is what I would have done.
> [PROSECUTOR]: Your Honor, I'm going to object to that argument.
> THE COURT: I am going to sustain that objection.
> [DEFENSE COUNSEL]: It is an argument. It is, *you have to put yourself in his shoes*. That's what you're required to do. *Put yourself in his shoes*.
> [PROSECUTOR]: Your Honor, I have to again object to that.
> THE COURT: I'm going to sustain that objection.
> [PROSECUTOR]: Ask that it be stricken.
> THE COURT: Jury's decision is going to be based upon their recollection of the evidence and the court's instruction on the law. I'm sustaining that objection.

30RP 23-24 (emphasis added).

The standard for self-defense is well settled. *State v. LeFaber*, 128 Wn.2d 896, 899, 13 P.2d 369 (1996), *abrogated on other grounds by State v. O'hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). A jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim. *Id.* A finding of actual imminent harm is unnecessary. *Id.* Rather, the jury should *put itself in the shoes of the defendant* to determine reasonableness from all the surrounding facts and circumstances as they appeared to the defendant. *Id.* (citing *State v. Janes*,

121 Wn.2d 220, 238-39, 850 P.2d 495 (1993), *State v. Allery*, 101 Wn.2d 591, 594, 682 P.2d 312 (1984), *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983), *State v. Wanrow*, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977)(emphasis added)). In a trial involving a claim of self-defense, "the defendant's actions are to be judged against [his] own subjective impressions and not those which a detached jury might determine to be objectively reasonable." *Wanrow*, 88 Wn.2d at 240. In erroneously sustaining the State's improper objections, the court further undermined McKittrick's claim of self-defense by precluding the jury from placing themselves in McKittrick's shoes to determine reasonableness as the law requires it to do.

The first aggressor instruction was clearly not warranted, particularly where the Supreme Court cautioned that it should be used sparingly because it impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Reversal is required because the court's error in giving the first aggressor instruction, compounded by the court's error in precluding the jurors from placing themselves in McKittrick's shoes, "prevented him from receiving a fair trial." *Douglas*, 128 Wn. App. at 565.

3. REVERSAL IS REQUIRED WHERE THE TRIAL COURT ERRED IN ADMITTING UNDULY PREJUDICIAL EVIDENCE OF McKITTRICK'S AFFILIATION WITH A SKINHEAD GROUP AND ALLOWING EXPERT TESTIMONY OF SKINHEAD CULTURE THEREBY DENYING McKITTRICK HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The Sixth Amendment to the United States Constitution and article I, section 21 of the Washington State Constitution guarantee a criminal defendant the right to a fair trial and an impartial jury. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009). "Only a fair trial is a constitutional trial." *State v. Coles*, 28 Wn. App. 563, 573, 625 P.2d 713, *review denied*, 95 Wn.2d 1024 (1981)(citing *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956)). The trial court's admission of evidence of McKittrick's affiliation with a skinhead group denied McKittrick his constitutional right to a fair trial.

"A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). ER 404(b) prohibits a trial court from admitting evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith. *State v. Foxhoven*, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007). Such evidence may be admissible for other purposes, including proof of motive, intent, or identity, but before a court admits such evidence, it must (1) find by a preponderance of

evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). "The State must meet a substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions to this general prohibition." *DeVincentis,* 150 Wn.2d at 17.

Cases involving gang evidence are instructive. "Like memberships in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association. Therefore, evidence of criminal street gang affiliation is not admissible in a criminal trial when it merely reflects a person's beliefs or associations." *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009)(citing *Dawson v. Delaware*, 503 U.S. 159, 166-67, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992). To admit evidence of gang affiliation, there must be a sufficient nexus between the crime and gang membership. *State v. Campbell*. 78 Wn. App. 813, 822, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004, 907 P.2d 296 (1995). Admission of gang evidence is measured under the standards of ER 404(b). *State v. Boot*, 89 Wn. App. 780, 788-90, 950 P.2d 964, *review denied*, 135 Wn.2d 1015, 960 P.2d 939 (1998).

Over defense objection, the trial court ruled that evidence of skinhead affiliation is admissible under ER 404(b). 8RP 127-49. The court allowed evidence that common characteristics among skinheads include not interfering with another man's home life, loyalty, and respect. 24RP 23-26. Discipline for violations range from being ordered to write an essay to a fight or assault. 24RP 27-28. Marital infidelity would be a sign of disrespect and constitutes a major violation and could result in more than a bare knuckle fight. 24RP 29-30, 40. A skinhead who commits an offense could be disciplined by a one-on-one fist fight or a fight against a group of skinheads. 17RP 92. Marital infidelity is considered a big betrayal of trust and loyalty "because as skinheads, you pledge your loyalty and respect and your honor to each other." 18RP 70-71.

The court found that the evidence was relevant to prove motive. 8RP 147-49. The pretrial testimony of Jeffrey Cooke does not support the court's decision where Cooke repeatedly said the dispute between Wagner and Stredicke was not a skinhead matter:

> Q. If somebody had been sleeping with your wife, would you have been upset?
> A. Absolutely.
> Q. Not a surprise that Mr. Stredicke was upset?
> A. No.
> . . . .
> Q. So it was a personal matter between Mr. Stredicke and Mr. Wagner, not a skinhead matter?
> A. Pretty much, yes.

. . . .

Q. To the best of your knowledge, it was not a skinhead issue, correct?

A. To the best of my knowledge.

Q. To the best of your knowledge it was a friendship issue, right?

A. Loyalty, yes.

8RP 60-61, 81.

Any ordinary juror could certainly understand affairs of the heart and loyalty among close friends. The State could have easily established a motive without evidence of skinhead affiliation and skinhead culture. For example in *State v. Wingate*, Stephen Park discovered that his friend, James Koo, was dating his former girlfriend. Park called Koo and said he was coming over to Koo's house to confront him about his involvement with Park's former girlfriend. Three of Park's friends followed Park to Koo's house with a gun in the trunk. Work circulated among Koo's friends that Park was on his way to confront Koo so a group of Koo's friends gathered at Koo's house, including Wingate who brought a gun. A fight ensued and Wingate shot Park in the leg. A jury convicted Wingate of assault. 55 Wn.2d 817, 818-20, 122 P.3d 908 (2005).

There is no meaningful difference between the motive in the *Wingate* case and the alleged motive in this case. The trial court erred in admitting the skinhead evidence because it was not relevant to prove the

crimes charged and there lacked a sufficient nexus between the crimes and skinhead affiliation.

Furthermore, the unduly prejudicial effect of the evidence far outweighed any probative value. In balancing the evidence's probative value against its prejudicial effect under ER404(b), the court must read ER 404(b) in conjunction with ER 403. "ER 403 requires exclusion of evidence, even if relevant, if its probative value is substantially outweighed by the danger of unfair prejudice." *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Gang evidence is prejudicial due to its general "inflammatory nature." *State v. Asaeli*, 159 Wn. App. 543, 579, 208 P.3d 1136 (2009).

During voir dire, the individual questioning of jurors revealed that any probative value of the evidence was substantially outweighed by the danger of unfair prejudice because of embedded preconceptions about skinheads. A juror responded, "I feel this world does not need people with beliefs that not everyone is equal." "There's no room in this world for hate." 10RP 26. When a juror was asked how the appearances of the three men would affect their ability to be fair and impartial, the juror replied, "Like the tattoo tear thing, I thought that those were for killing somebody or doing time in jail already, and so that would be a bad sign for me." 10RP 43. Another juror believed that skinheads were a radical organization

"[b]ecause it's not -- the things they do are similar to what I attribute radical people do, being prejudiced or acting on those beliefs, killing, threatening or hurting somebody." 10RP 115. Although some jurors said they did not believe they could be fair, generally "[i]t's 'unlikely that a prejudiced juror would recognize his [or her] own personal prejudice-or knowing it, would admit it.' " LAFAVE ET. AL, CRIMINAL PROCEDURE, section 22.3(c), at 308 (2d ed, 1999)(quoting A. FRIENDLY & R. GOLDFARB, CRIME AND PUBLICITY 103 (1967)).

An erroneous admission of evidence under ER 404(b) requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. *State v. Halstien*, 112 Wn.2d 109, 127, 857 P.2d 270 (1993). Evidence that skinheads resolve disrespect for skinhead codes with violence invited the jury to infer that because McKittrick is a skinhead, he must have a propensity for violence, which is precisely what ER 404(b) forbids. "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (2001). The evidence further allowed the State to argue during closing argument, using PowerPoint, that the skinhead evidence "[p]rovided the lens through which evidence must be viewed." Ex. 274. The State emphasized,

"Respect. Loyalty. Discipline. Comrade. Bruder. Pyres." Ex. 274. The prosecutor improperly expressed her personal opinion that the defendants are "not ordinary people" because they are skinheads. 30RP 149. "[P]rosecutors would best serve the criminal justice system by purging language expressing their personal thought process from the courtroom." *State v. Jackson*, 150 Wn. App. 877, 889, 209 P.3d 553 (2009).

Although the court gave a limiting instruction,[8] a jury is "made up of human beings whose condition of mind cannot be ascertained by other human beings. Therefore it is *impossible* for courts to contemplate the probabilities any evidence may have upon the minds of jurors." *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946)(emphasis added). The record substantiates that within reasonable probability, admission of the evidence materially affected the outcome of the trial.

A trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012)(quoting *State v. Powell*, 126 Wn.2d 224, 258, 893 P.2d 615 (1995). A trial court bases a discretionary decision on untenable grounds or makes it for untenable reasons if it rests on facts unsupported by the record. *State v. Quismundo*, 164 Wn.2d 499,

[8] CP 329.

504, 192 P.3d 342 (2008). The trial court abused its discretion in admitting the evidence and allowing the expert testimony where its decision is unsupported by the record.[9] McKittrick's convictions must be reversed because he was denied his constitutional right to a fair trial and the presumption of innocence.

4. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE McKITTRICK REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 provides in relevant part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680

[9] The trial court abused its discretion in admitting the skinhead evidence therefore abused its discretion in admitting expert testimony. *Asaeli*, 159 Wn. App. at 578-79.

(2015)(citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS (2010)). In 2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The report points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs "is a matter of discretion for the appellate court, consistent with the appellate court's authority under RAP 14.2 to decline to award costs at all." The Court emphasized that the authority "is permissive" as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute states that the "court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs." RCW 10.73.160(1)(emphasis added).

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court

determined that he is indigent. The trial court found that McKittrick is entitled to appellate review at public expense due to his indigency and entered an Order of Indigency. CP 486-89. This Court should therefore presume that McKittrick remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), the Court exercised its discretion and ruled that an award of appellate costs was not appropriate, noting that the procedure for obtaining an order of indigency is set forth in RAP Title 15 and the trial court is entrusted to determine indigency. "Here, the trial court made findings that support the order of indigency. . . . We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. . . . We therefore presume Sinclair remains indigent." *Sinclair*, 192 Wn. App. at 393.

As in *Sinclair*, there has been no evidence provided to this Court, and no findings by the trial court that McKittrick's financial condition has improved or is likely to improve. McKittrick is presumably still indigent and this Court should exercise its discretion to not award costs.

F. CONCLUSION

"Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt." RCW 9A.04.100(1).

For the reasons stated, this Court should reverse and dismiss McKittrick's convictions because the State failed to prove all the elements of manslaughter and felony murder beyond a reasonable doubt.

In the alternative, this Court should reverse McKittrick's convictions because the trial court erred in giving the first aggressor instruction and compounded the error by sustaining the State's improper objections to defense counsel's closing argument on self-defense.

Further, this Court should reverse McKittrick's convictions because the trial court abused its discretion in admitting irrelevant, unduly prejudicial evidence of skinhead culture thereby denying McKittrick his right to a fair trial.

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs because McKittrick remains indigent.

DATED this 29th day of July, 2016.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
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Attorney for appellant, Shanne Thomas McKittrick

DECLARATION OF SERVICE

On this day, the undersigned sent by e-mail, a copy of the document to which this declaration is attached to the Pierce County Prosecutor's Office and Stephanie Cunningham, counsel for Eric Elliser, and by U.S. Mail to Shanne McKittrick, DOC # 333672, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washington 99362.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of July, 2016.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

MARUSHIGE LAW OFFICE

July 29, 2016 - 11:03 AM

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